No. 13345

UNITED STATES

COURT OF APPEALS

for the Ninth Circuit

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

Petition for Review to Set Aside Order of the Federal Power Commission

BRIEF OF INTERVENOR PORTLAND GENERAL ELECTRIC COMPANY IN ANSWER TO BRIEF AMICUS CURIAE OF THE OREGON DIVISION OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.

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INDEX

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OPENING STATEMENT

This brief is made only in reply to the brief filed amicus curiae by the Oregon Division of the Izaak Walton League of America, Inc.

The only points raised in the brief of the Oregon Division of the Izaak Walton League of America, Inc. are those pertaining to factual questions and whether or not the Federal Power Commission had before it substantial evidence upon which to make its findings referred to in the brief amicus curiae.

POINTS AND AUTHORITIES

The court does not substitute its judgment for that of an administrative agency and a finding of fact by the administrative agency is conclusive.

42 A. J. 632, et seq. Section 211
42 A. J. 645, Section 217
42 A. J. 680, Section 240

In order for an appellate court to make any determination of factual matters, it is required for the court to have before it all of the evidence upon the subject which had been submitted to the administrative body.

42 A. J. 674, Section 235.

Mississippi Valley Barge Line Company, v. U. S. 292 U. S. 282, 78 L. Ed. 1260, 1264

Court of appeals may not retry a controversy or substitute its judgment for that of the Federal Power Commission as to any doubtful or debatable questions of fact.

State of Iowa v. Federal Power Commission, 178 Fed. 2d. 421, certiorari denied, U. S. Sup. Ct. 339 U. S. 979, 94 L. Ed. 1383.

Safe Harbor Water Corporation v. Federal Power Commission, 179 F. 2d. 179, 199. Certiorari denied by U. S. Sup. Ct., 339 U. S. 957, 70 S. Ct. 980, 94 L. Ed. 1368.

Federal Power Commission v. Idaho Power Company, ——US——, 97 L. Ed. (Advance Sheets p. 9)

The Oregon Division of the Izaak Walton League of America, Inc. is not an aggrieved party under the provisions of the Federal Power Act.

USCA Title 16, Section 825 l

U. S. ex rel Chapman v. Federal Power Commission, 191 Fed. 2d. 796

Interstate Electric Inc. v. Federal Power Commission, 164 Fed. 2d. 485.

ARGUMENT

All Evidence Must Be Brought Before The Court on Questions of Fact

The brief of the Fish Commission of Oregon and the Oregon State Game Commission does not attempt to argue all of the assignments of error raised by it before the Federal Power Commission. The brief amicus curiae filed on behalf of the Oregon Division of the Izaak Walton League of America, Inc. appears to cover those assignments of error not covered by the brief of the Fish Commission of Oregon and the Oregon State Game Commission.

The assignments of error alluded to in the brief of the Oregon Division of the Izaak Walton League of America, Inc. all pertain to findings of fact made by the Federal Power Commission, some of which pertain to fish in the Deschutes River and others pertain to the costs of fish facilities as determined by the Federal Power Commission and the shortage of power in the area served by the Portland General Electric Company, the licensee under the order of the Federal Power Commission.

The petitioners, the Fish Commission of Oregon and the Oregon State Game Commission have not seen fit to bring before the court the entire record of testimony and evidence, and therefore this court is hardly in a

position to make any determination as to the quality or quantity of evidence which was considered by the Federal Power Commission.

The court will observe from reading the record that the printer indicates the paging of the transcript before the Federal Power Commission on those portions of the record which were printed for the benefit of this court and that many gaps in the paging appear in the record before this court.

On the questions of fish, the testimony is not included of such witnesses as Ralph P. Cowgill, W. J. Smith, B. L. McKay, L. Bates, Robert L. Ring, Howard Turner. With respect to the power shortage in the area, the testimony is not included in the record of such witnesses as Marion E. Cady, W. L. Vinson, James K. Marr, Arthur Porter, Waldemar Seton, Thos. W. Delzell, Almon D. Thomas, Dr. Joseph J. A. Jessel. With respect to the costs of operation of the proposed project and the amount of electric energy to be produced therefrom, the record does not show the testimony of Arthur Porter, an engineer, W. E. Enns, an engineer, A. G. Sunda, an engineer of the Federal Power Commission, Almon D. Thomas, an electrical engineer of the Federal Power Commission and Dr. Joseph J. A. Jessel, an electrical engineer of the Federal Power Commision.

The testimony of some of the witnesses whose testimony is reported in the printed record only shows a part thereof and is not the complete testimony of such witnesses.

As an example of how this deficiency in the record leaves the court without all the necessary information, including the writer of the brief amicus curiae, let us take Point I under the argument shown on page 4 of the brief amicus curiae where it is claimed that there is no substantial evidence in the record to support the finding as to the annual cost to the licensee of fish conservation facilities in the amount of $795,000.

The staff of the Commission and the engineer of the applicant presented testimony as to certain costs of operation. Exhibits numbered 26 and 28 before the Federal Power Commission dwell upon these costs. The staff of the Federal Power Commission estimated the annual cost of fishery facilities as follows:

Annual cost of money, depreciation, and taxes on an investment of $4,430,000 (the reregulating dam)	$ 410,000.00
Annual cost of operation and maintenance cost of the reregulating dam	10,000.00
Annual operation and maintenance cost of the fish propagation facilities	255,000.00
Total estimated annual cost	$ 675,000.00

However, the examiner of the Federal Power Commission who heard the evidence and made a recommended decision (R. 351) revised the item of annual operation and maintenance cost of the fish propagation facilities from $255,000 to $325,000, and an additional allowance of $40,000 for an egg taking station bringing the figure to $375,000, or a total of $795,000 as the annual cost to the applicant of fish conservation facilities.

With respect to the argument on Point II, page 5 of the brief amicus curiae, the values attributable to the project and the amount that such values would exceed the costs and losses associated therewith were all outlined by the witnesses who gave testimony as to costs and power values such as Arthur Porter, Waldemar Seton, Thos. W. Delzell, A. G. Sunda, Almon D. Thomas, and Dr. Joseph J. A. Jessel, none of whose testimony is included in the record.

Each argument and point could be thus treated, but in view of the authorities cited herein, we feel it is unnecessary to go through each point in the brief amicus curiae.

It appears that a material part of the record has not been printed if the petitioner desired to pursue the assignments of error premised upon the findings of fact of the Commission. Under rule 19 of this court, this would ordinarily be ground for dismissal of the appeal.

However, the factual matters are argued principally in the brief amicus curiae, and it is assumed that the most this court could do would be to either strike the brief amicus curiae from the record, or ignore the same in its determination.

In order for an appellate court to make a determination of a factual matter, it is necessary that the court have before it all of the evidence upon the subject which has been submitted. 42 *A. J.* 674, *Section* 235. See also *Mississippi Valley Barge Line Company v. U. S.*, 292, *US* 282,78 *L. Ed.* 1260, 1264, where the court said:

> "The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. Apiller v. Atchison, T. & S. F. R. Co. 253 U. S. 117, 125, 64 L. ed. 810, 817, 40 S. Ct. 466; Louisiana & P.B.R. Co. v. United States, 257 U. S. 114, 116, 66 L. ed. 156, 158, 42 S. Ct. 25; Nashville C. & St. L. R. Co. v. Tennessee, 262 U. S. 318, 324, 67 L. Ed. 999, 1003, 43 S. Ct. 583; Edward Hines Yellow Pine Trustees v. United States, 263 U. S. 143, 148, 68 L. ed. 216, 220, 44 S. Ct. 72; Chicago, I. & L. R. Co. v. United States, 270 U. S. 287, 295, 70 L. ed. 590, 595, 46 S. Ct. 226. The appellant did not free itself of this restriction by submitting additional evidence in the form of affidavits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance.

The Court Does Not Substitute Its Judgment for That of An Administrative Agency.

It is fundamental law that an appellate court does not attempt to substitute its own views as to facts which are found by an adminisrative authority. 42 *A. J.* 632, *Section* 211; 42 *A. J.* 645, *Section* 217. A presumption is in favor of the administrative agency and the burden of proving otherwise is upon the party complaining. 42 *A. J.* 680, *Section* 240.

This same reasoning has been held specifically with respect to findings of the Federal Power Commission. In *State of Iowa v. Federal Power Commission,* 178 *Fed. 2d.* 421, the court said:

> "(4) While we may entertain the same views as those expressed by the Federal Power Commission in the Gasconade case and by the Trial Examiner, the Chairman of the Commission, and the State of Iowa in this case with respect to the economic feasibility of the project and the soundness of the proposed plan of financing its construction, that would not, in our opinion, give us the right to vacate the orders of the Commission granting the license. If this license has been improvidently granted, as the State of Iowa insists, whatever stigma may subsequently attach to its issuance or to the execution of the questionable plan for financing the cost of the project will have to be borne by the Commission alone. It is to be remembered that, within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not confined to deciding them correctly. Pittsburgh Plate Glass Co. v. National Labor Re-

> lations Board, 8 Cir., 113 F. 2d 698, 701, affirmed 313 U. S. 146, 61 S. Ct. 908, 85 L. Ed. 1251."

Certiorari was denied in the above case by the United States Supreme Court, 339 *U. S.* 979, 94 *L. Ed.* 1383.

In *Safe Harbor Water Corporation v. Federal Power Commission,* 179 *F. 2d.* 179, 199, the court pointed out that such issues of fact lie distinctly within the province of the Commission, and that the court may not try such issues. In this case certiorari was denied by the United States Supreme Court, 339 *U. S.* 957, 70 *S. Ct.* 980, 94 *L. Ed.* 1368.

Also in the recent case of *Federal Power Commission v. Idaho Power Company* ——*US*——, 97 *L. Ed.* (*Advance Sheets, page* 9, 11), where the court said:

> "The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part'. Sec. 313 (b), 16 USC Sec. 8251 (b). But that authority is not power to exercise an essentially administrative function. See Ford Motor Co. v. National Labor Relations Board, 305 US 364, 373, 374, 83 L ed 221, 229, 230, 59 S Ct 301; Jacob Siegel Co. v. Federal Trade Com. 327 US 608, 90 L ed 888, 66 S Ct 758. The nature of the determination is emphasized by Sec. 10 (a) which specifies that the project adopted 'shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of water power development, and for other beneficial public uses.' Whether that objective may be achieved if the contested conditions are stricken from the order is an administrative, not a judicial, decision."

The Oregon Division of the Izaak Walton League of America, Inc., Is Not An Aggrieved Party

Although the Oregon Division of the Izaak Walton League made an appearance in the proceeding before the Federal Power Commission, it is not an aggrieved party within the purview of the Federal Power Act. Under the provisions of *Title* 16, *Section* 825 *l USCA,* only a party aggrieved by an order issued by the Commission may obtain a review of such order in the Circuit Court of Appeals. The Oregon Division of the Izaak Walton League of America, Inc. has not shown either in the record before this court, or before the Federal Power Commission, where or how it would be aggrieved by the construction of a project under the license issued by the Federal Power Commission. It has no particular interest either in the water or fish in the Deschutes River, or any ownership or proprietorship thereto, nor any interest in the lands bordering upon said river.

The case of *U. S. ex rel Chapman v. Federal Power Commission,* 191 *Fed 2d.* 796,800, the Secretary of the Interior and a cooperative association petitioned for the review of an order of the Federal Power Commission granting a license to the Virginia Electric and Power Company to construct a dam at Roanoke Rapids, North Carolina. The court held that the petitioners were not

parties aggrieved under the above statute. In its opinion, the court said:

> "(5) For the reasons stated, we are of the opinion that petitioners are not parties aggrieved within the meaning of the statute and consequently have no standing in court to ask that the order of the Commission be reviewed or set aside. Assuming, however, that they have made a case entitling them to relief, since we are of opinion, for reasons which we shall not examine, that the granting of the license here in question was within the Commission's power and that there is no basis for holding that the discretion vested in it by law was not properly exercised."

Also in the case of *Interstate Electric, Inc. v. Federal Power Commission,* 167 *Fed. 2d.* 485, the court held that the Interstate Electric, Inc., the State Public Utility Commissioners Association, and the State Grange were not parties aggrieved by an order of the Federal Power Commission.

CONCLUSION

In view of the fact that the entire record has not been brought to this court and the further fact that the findings of the Federal Power Commission, are conclusive in any event, and that the Oregon Division of the Izaak Walton League of America, Inc. is not an aggrieved party, we respectfully submit that this court should either strike the brief of the Oregon Division of the Izaak Walton

League of America, Inc. from the files herein, or entirely ignore the same.

Respectfully submitted,

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